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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM—1924.

THE UNITED STATES,  
Petitioner,  
  
v.  
  
O. B. FISH,  
Respondent.

No. 653.

*On Petition for Writ of Certiorari to the United States  
Court of Customs Appeals.*

**BRIEF FOR RESPONDENT.**

**Statement of Case.**

The decision below is reported in T. D. 40315, Treasury Decisions, Vol. 46, No. 3, July 17, 1924, page 34.

Petitioner's statement of the case and the facts is not controverted, but the following circumstances not referred to by petitioner, have a material bearing upon the issues in the case.

1. Section 489 of the Tariff Act of 1922, c. 356, 42 Stat., 858, imposes upon the Board of General Appraisers the duty of finding as a fact, upon the evidence submitted to it, the existence or non-existence of fraud in connection with the making of the entry. That is the only function of the Board. In this case the Board did not make the

statutory finding (R., 11, 12), but the Court of Customs Appeals found (R., 21) that the importer was denied a remission of the additional duties chiefly, if not entirely, upon the ground that he was very careless in the transaction relating to the making of the entry. The Court of Customs Appeals, therefore, did not assume to reverse a finding of the Board of General Appraisers on the statutory fact of fraud but reversed the Board because the Board had determined the case on other than statutory grounds. This was why the Court of Customs Appeals *remanded the case for a new trial* (R., 22).

The question for determination, therefore, is not whether the Court of Customs Appeals *in any case* has jurisdiction to entertain appeals from decisions granting or denying petitions for the remission of additional duties filed under Section 489 of the Tariff Act of 1922. Succinctly stated, the issue is: Has the Court of Customs Appeals jurisdiction to reverse the decision of the Board of General Appraisers and remand the case for a new trial, when the Court has found that the Board of General Appraisers did not conform to its statutory jurisdiction, did not make its statutory finding, but decided the case on extra-statutory grounds?

2. The entries in this case were not liquidated at the time when the petitions for remission of additional duties were filed. This is alleged in the petitions (R., 3, 5), and is nowhere controverted. The entries themselves show that they have not been liquidated even yet. The entries have not been stamped "liquidated" in accordance with Article 741, paragraph (g), Customs Regulations 1923.

In view of the fact that the entries have not been liquidated and no additional duties have been imposed, the question arises whether these petitions, although filed in

accordance with the then rule of the Board of General Appraisers, are not premature and null and void under the statute. Upon the liquidation of the entries the importer can file new petitions under the amended rule of the Board of General Appraisers.

The petitions for remission under consideration were filed within sixty days from the date of final appraisement in each case in accordance with the rule of the Board of General Appraisers then in effect, which rule made the time within which such petitions might be filed, run from the date of final appraisement irrespective of the liquidation of the entries. T. D. 39370, 42 Treas. Dec. 302. Afterwards, the Board of General Appraisers extended the time for filing petitions for remission of additional duties to sixty days after liquidation.

T. D. 40464, Treas. Dec. Vol. 46, No. 21, Nov. 20, 1924, page 1.

Section 489 of the Tariff Act of 1922 reads as follows. The portions deemed pertinent have been italicized:

*"ADDITIONAL DUTIES.—If the final appraised value of any article of imported merchandise which is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the entered value, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total final appraised value thereof for each 1 per centum that such final appraised value exceeds the value declared in the entry. Such additional duty shall apply only to the particular article or articles in each invoice that are so advanced in value upon final appraisement and shall not be imposed upon any article upon which the amount of duty im-*

*posed by law on account of the final appraised value does not exceed the amount of duty that would be imposed if the final appraised value did not exceed the entered value, and shall be limited to 75 per centum of the final appraised value of such article or articles. Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the appraised value of any merchandise exceeds the value declared in the entry by more than 100 per centum, such entry shall be presumptively fraudulent, and the collector shall seize the whole case or package containing such merchandise and proceed as in case of forfeiture for violation of the customs laws; and in any legal proceeding other than a criminal prosecution that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he rebuts such presumption of fraud by sufficient evidence.*

*"Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. Such additional duties shall not be refunded in case of exportation of the merchandise, nor shall they be subject to the bene-*

fit of drawback. All additional duties, penalties, or forfeitures applicable to merchandise entered in connection with a certified invoice shall be alike applicable to merchandise entered in connection with a seller's or shipper's invoice or statement in the form of an invoice. Duties shall not, however, be assessed upon an amount less than the entered value, except in a case where the importer certifies at the time of entry that the entered value is higher than the value as defined in this Act, and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisal or re-reappraisal, and the importer's contention in said pending cases shall subsequently be sustained, wholly or in part, by a final decision on reappraisal or re-reappraisal, and it shall appear that the action of the importer on entry was so taken in good faith, after due diligence and inquiry on his part, and the collector shall liquidate the entry in accordance with the final appraisal."

## **SUMMARY OF POINTS.**

### **I.**

**The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code.**

### **II.**

**There is nothing in the Tariff Act of 1922 which indicates an intent upon the part of Congress to depart from the previous rulings as to the scope of the jurisdiction granted to the Court of Customs Appeals by sections 195 and 198 of the Judicial Code.**

### III.

The language of section 489 of the Tariff Act of 1922 indicates that the decisions of the Board of General Appraisers in remission cases are reviewable.

### IV.

If the petitions for remission of additional duties (which, under the Board's rule, were filed before the liquidation of the entries) are premature, then all the proceedings thus far have been a nullity, and the importer will have the opportunity, upon the liquidation of the entries, of filing petitions which are valid and timely under the amended rule of the Board.

## ARGUMENT.

### I.

The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code.

Respondent does not claim that the Court of Customs Appeals has any further or greater jurisdiction than that which Congress has apportioned to it. The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code, March 3, 1911, c. 231, 36 Stat. 1087, as amended by the Act of Cong., Aug. 22, 1914, c. 267, 38 Stat. 703. These sections so far as material read as follows:

### *Section 195.*

"The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. \* \* \*

### *Section 198.*

"If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. \* \* \*

It will be noted that section 195 gives the Court of Customs Appeals jurisdiction to review final decisions of the Board of General Appraisers in three classes of cases: (1) cases involving the classification of merchandise and the rate of duty imposed thereon under such classification, (2) questions as to the jurisdiction of the Board of Gen-

eral Appraisers, (3) all appealable questions as the laws and regulations governing the collection of the customs revenues.

This case is not in the first class. It does not relate to the classification of merchandise and the rate of duty imposed thereon under such classification, for the entries have never been liquidated and the Collector has not classified the merchandise for duty.

*This case is within the third class of appealable questions specified in section 195 of the Judicial Code. The case presents an appealable question as to the laws and regulations governing the collection of the customs revenues within the meaning of Section 195. Before the Tariff Act of 1922 was passed it was held that any final decision of the Board of General Appraisers was appealable except when an appeal had been denied by the statute.*

Under the Tariff Act of Aug. 5, 1909, c. 6, 36 Stat. 11, by which statute the decision of the Board of General Appraisers was made final in reappraisement cases, the Court of Customs Appeals said:

"We think, however, that no purpose on the part of Congress to vest a jurisdiction in the board over cases not reviewable by this Court (except in appraisements) can be found if the terms of the act as a whole be considered."

*Atlantic Transport Co. v. United States*, 5 Ct. Cust. Appls. 373, 374.

This is precisely the view of this Court as to the Circuit Court's jurisdiction (prior to the organization of the Court of Customs Appeals) to entertain appeals from decisions

of the Board of General Appraisers under the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131. The Court said:

"In other words, the right of review by the Circuit Court is co-extensive with the right of appeal to the board as to all matters except the *dutiable value* of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive."

*United States v. Klingenberg*, 153 U. S., 93, 102.

*It must be presumed that Congress enacted the Tariff Act of 1922 in the light of the previous decisions as to the scope of the jurisdiction of the appellate tribunal, and intended that all decisions of the Board of General Appraisers therein provided for should be subject to review by the Court of Customs Appeals unless a statutory indication to the contrary was given. Such an indication is given, for instance, in section 501 of the Tariff Act of 1922, where Congress has provided that appeals to the Court of Customs Appeals in reappraisement cases should be limited to questions of law, whereas section 195 provides for appeals generally on questions of both fact and law.*

*In section 489, on the contrary, there is not the slightest suggestion that the decisions of the Board of General Appraisers on petitions for remission of additional duties are to be final and so excepted from the appellate jurisdiction of the Court of Customs Appeals, nor is there any indication in section 489 that the jurisdiction granted in section 195 of the Judicial Code is to be in any way restricted.*

*This case is within the second class of appealable ques-*

*tions specified in section 195 of the Judicial Code. The case involves an appealable question as to the jurisdiction of the Board of General Appraisers within the meaning of section 195.*

Under section 489 of the Tariff Act of 1922 the only function of the Board of General Appraisers is to pass upon the question of the presence or absence of fraud in the making of the entry. This is not a case where the question is whether the Board of General Appraisers found the statutory fact in accordance with the testimony. Such a case might present a very different issue. In the present case the issue presented to the Court of Customs Appeals was jurisdictional in its character and it is on that issue that the Court of Customs Appeals determined the case. The Court of Customs Appeals reversed the judgment of the Board, not because the Board's finding of fact as to fraud was contrary to the weight of the evidence, but because the Board never determined the statutory fact at all but went outside the scope of its jurisdiction and determined the case on the question of carelessness. The Court of Customs Appeals said (R. 21, 22) :

"In the present case however, as above observed, we find that the Board of General Appraisers denied the petition of the importer apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent. The opinion below closes with the following statement: 'The most that can be said about the importer was that he was very careless. Sometimes neglect is as bad in law as acts of commission.'

"We need not here discuss the question raised by the fact that the importer failed to call as a witness the broker who made the entry, for we are sat-

isfied that the judgment of the board must be reversed upon the ground that apparently the importer was denied a remission of the additional duties chiefly if not entirely upon the ground that he was very careless in the transaction relating to the making of the entry. As we have stated above the burden rested upon the importer to establish by satisfactory evidence that his action was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the importer in any such case establishes these facts as aforesaid he becomes entitled thereby to the findings of the board in his favor as prescribed by the statute, and he would not forfeit that right because of mere carelessness alone upon his part in the transaction.

"In the present case, if we construe the board's opinion correctly, the importer's petition was denied upon the ground that if the importer was not guilty of fraud he was at least very careless. We do not regard this finding as an answer to the issue raised by the importer's petition, or as a sufficient ground for its denial, accordingly we reverse the board's judgment and remand the case for a new trial."

It is apparent from the above that the decision of the Court of Customs Appeals is based upon the fact that the Board of General Appraisers made no finding as to the fact required by the statute, but determined the case upon an extra-statutory ground, to wit, carelessness. The Court of Customs Appeals *remanded the case for a new trial*. It is obvious that it did so on jurisdictional grounds in order to permit the board to fulfill its statutory function which it had neglected. That the decision of the Court of Customs Appeals was jurisdictional in its nature

is shown in part by the fact that the Court found it unnecessary to discuss the question raised by the importer's failure to call as a witness the custom-house broker who did the actual physical clerical work in making the entry.

Whether or not the Court of Customs Appeals interpreted this decision of the Board of General Appraisers correctly is not in issue on this proceeding. The sole question is whether the Court of Customs Appeals has jurisdiction to reverse a decision of the Board of General Appraisers and remand the case for a new trial in a case where the Board of General Appraisers has failed to exercise its jurisdiction by making a finding as to fraud, but has decided the case on the question of carelessness irrespective of whether or not there was fraud.

*The question of the appellate jurisdiction of the Court of Customs Appeals in these remission cases has been heretofore determined in favor of that jurisdiction.*

The decision of the Court of Customs Appeals now under review follows the decision of the same Court in the case of *Wm. A. Brown & Co., et al. v. United States*, T. D. 40026, 45 Treas. Dec. 199. The Court there affirmed its jurisdiction, but decided the case on the merits in accordance with the Government's contention. The importers applied to this Court for a writ of certiorari, which application was denied by this Court on April 28, 1924. The United States, respondent in that case, called the attention of this Court to the fact that the issue as to the jurisdiction of the Court of Customs Appeals was an issue in the case. The following language appears on page 5 of the brief for the United States in that case:

"Has the United States Court of Customs Appeals jurisdiction to review a finding of the Board of United States General Appraisers made on a

petition for the remission of additional duties under said section 489?

"This issue was raised before the Court of Customs Appeals by a motion duly filed on behalf of the United States to dismiss the importer's appeal from a decision of the Board of General Appraisers which had dismissed the importer's petition on the ground that it was without jurisdiction in the matter. This motion was denied by the Court of Customs Appeals.

"The respondent submits that in the event of a writ of certiorari being granted herein, the question as to the jurisdiction of the Court of Customs Appeals over appeals involving the remission of additional duties under said section 489 is properly before this Court for consideration, notwithstanding the fact that the final decision in the instant case was in favor of the United States.

"If it shall be determined by this Court that a writ of certiorari be granted herein, the respondent requests that a review shall be had of the jurisdiction of the Court of Customs Appeals to entertain any appeal from decisions of the Board of General Appraisers on petitions for remission filed under said section 489."

In the case of *Peabody & Co. v. United States*, T. D. 40491, Treas. Dec. Vol. 46, No. 21, Nov. 20, 1924, page 69, the Court of Customs Appeals reviewed a decision of the Board of General Appraisers on a petition for remission and reversed the decision. The Government seems not to have objected to the jurisdiction of the Court of Customs Appeals in that case.

In *United States v. American Metals Co., Ltd.*, T. D. 40612, Treas. Dec. Vol. 47, No. 3, Jan. 15, 1925, page 56, the Court of Customs Appeals determined an appeal by the United States from a decision of the Board of General

Appraisers on a petition for remission. The importer, appellee in that case, moved to dismiss the appeal on the ground of jurisdiction, but the Court of Customs Appeals denied the motion to dismiss. In that case it will be noted that the Board of General Appraisers did make its statutory finding as to fraud, and at least one of the issues determined by the Court of Customs Appeals was whether the finding of the Board of General Appraisers was supported by the evidence.

The following appeals by the United States from decisions of the Board of General Appraisers on petitions for remission are now pending:

	Customs Court No.
<i>United States v. R. H. Macy &amp; Co.,</i>	Suit 2247
<i>United States v. N. Y. Willow Furniture Co.,</i>	Suit 2435
<i>United States v. John V. Farwell Co.,</i>	Suit 2450
<i>United States v. Herbert Alfred Barnard,</i>	Suit 2461

## II.

**There is nothing in the Tariff Act of 1922 which indicates an intent upon the part of Congress to depart from the previous rulings as to the scope of the jurisdiction granted to the Court of Customs Appeals by sections 195 and 198 of the Judicial Code.**

*The provisions in the Tariff Act of 1922 relating to appeals, which are cited for the United States, petitioner, do not carry the implication that there is to be no appeal*

*in these remission cases arising under section 489 of the Tariff Act of 1922.*

It is extremely significant that the only sections of the Tariff Act of 1922 (sections 316 and 517) which affirmatively grant a right of appeal to the Court of Customs Appeals are sections where the Judicial Code was not broad enough in its terms to constitute a basis for the appellate court's jurisdiction. Section 316 grants an appeal to the Court of Customs Appeals from decisions of the United States Tariff Commission. This was necessary because the Judicial Code gave the Court of Customs Appeals jurisdiction over only appeals from decisions of the Board of General Appraisers. Section 517 grants a right of appeal to the Court of Customs Appeals where the Board of General Appraisers has imposed a penalty for filing a frivolous protest. This was necessary because, although the decision is a decision of the Board of General Appraisers, the subject-matter does not involve a question as to the laws and regulations governing the collection of the customs revenue and so is not within the terms of the Judicial Code.

The other sections referred to by the United States do not confer appellate jurisdiction but merely recognize the existing jurisdiction by providing for the finality of decisions of the Board of General Appraisers if an appeal is not taken as provided by the Judicial Code.

Section 501 deals with appeals in reappraisement cases. It does not confer appellate jurisdiction upon the Court of Customs Appeals in such cases. It limits the jurisdiction granted by the Judicial Code to questions of law. The Judicial Code grants jurisdiction in all questions of law and fact. Similarly sections 515, 516 (c) and 563 do not confer any jurisdiction upon the Court of Cus-

toms Appeals. They merely provide that in each instance the decision of the Board of General Appraisers shall be final unless an appeal is taken as provided by the Judicial Code. It is the Judicial Code which confers the jurisdiction. Section 515 relates to the finality of the decisions of the Board of General Appraisers in protest cases. It must be read in connection with section 514 which provides for protests against decisions of the Collector. These provisions are carried over from the language of the Customs Administrative Act, June 10, 1890, c. 407, 26 Stat. 131. This act established the Board of General Appraisers. The language as to the finality of decisions found in sections 514 and 515 of the Tariff Act of 1922 finds its origin in the Customs Administrative Act of 1890. The original purpose was to do away with the common-law method of attacking decisions of the Collector and to make the special statutory procedure exclusive.

*The fact that section 489 gives the Board of General Appraisers authority to determine the question of fraud in the entry on "satisfactory evidence," does not indicate that the Board of General Appraisers is to have discretionary, arbitrary and unreviewable power in the premises.*

This question is determined in the present case by the Court of Customs Appeals in the decision below (R., 19, 20). Even if the Court's decision were not sound, its interpretation of the statute could not be questioned on this proceeding as the Court remanded the case for a new trial, and the only question here involved is the jurisdiction of the Court to render its decision, not the correctness of the decision. The Court of Customs Appeals said (R., 19, 20):

"A casual reading of section 489 might lead to the hasty conclusion that the words 'upon petition filed and supported by satisfactory evidence under such rules as the board may prescribe' left action upon the petition to the arbitrary discretion of the board, and that 'satisfactory evidence' might mean *satisfactory to the board*. This was not the intention of Congress, and the courts have not so construed similar provisions.

"In *United States v. Lee Huen* (118 Fed. 442) the court was construing the following provision from the statutes:

" 'That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.'

and the court there said:

" 'In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied.'

"The court quoted Stephens' Digest and Greenleaf on Evidence, as defining 'satisfactory evidence,' as follows:

"'Satisfactory or sufficient evidence: That amount or weight of evidence which is adapted to convince a reasonable mind.' (Steph. Dig. Ev. 2d Ed., p. 3, note 2.)

"'By "satisfactory evidence," which is sometimes called "sufficient evidence," is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.' (I Greenleaf, Evidence, Sec. 2.)" (R., 19, 20.)

The power given to the Board of General Appraisers in connection with petitions for remission is not a pardoning power but a judicial power. The Board merely finds the facts as to fraud. The remission of the additional duties is not in the hands of the Board at all, but is in the hands of the Collector.

In the Report of the United States Tariff Commission upon the Revision of the Customs Administrative Laws, 1918, pages 18, 19, is to be found the recommendation of the Tariff Commission which led to the amelioration of the harshness of the law which at that time imposed additional duties in the case of under-valuations even when the under-valuations were innocent. The Tariff Commission recommended that the finding as to fraud should be made by the Secretary of the Treasury. Congress,

however, recognizing that this finding was judicial in its character, did not adopt the recommendation of the Tariff Commission, but invested the Board of General Appraisers with jurisdiction to make its judicial finding. It will be noted in section 489 that the Board of General Appraisers has nothing whatever to do with the remission of the additional duties. It simply makes its statutory finding. The remission of the additional duties is provided for in the second paragraph of section 489 and is evidently to be made by the Collector by liquidation. The Board of General Appraisers no more remits the additional duties than it reliquidates the entry.

### III.

**The language of section 489 of the Tariff Act of 1922 indicates that the decisions of the Board of General Appraisers in remission cases are reviewable.**

As shown above, both this Court and the Court of Customs Appeals prior to the passage of the Tariff Act of 1922 held it to be the purpose of Congress that there should be an appeal from all decisions of the Board of General Appraisers unless a specific exception is made. The reason for this purpose on the part of Congress is easily ascertainable from the constitution of the Board of General Appraisers itself. It is made up of three separate sub-boards (section 518, Tariff Act of 1922) and, unless there is an appeal, there is no way of unifying and harmonizing the decisions of these three sub-boards.

*The fact that section 489 does not make the decisions of the Board of General Appraisers final in remission cases*

*shows that Congress intended that those decisions should be reviewable.*

Section 514 of the Tariff Act of 1922 is a re-enactment of the provision for protests against decisions of the Collector. For the first time it extends the right of protest to include the legality of all orders and findings entering into the Collector's decision. The entries in the case here under consideration have not been liquidated. Therefore, if there is no direct appeal to the Court of Customs Appeals from the decision on the petition, the question of the legality of the decision can unquestionably be raised by protest at the time of the liquidation of the entries.

Before the passage of the Tariff Act of 1922, when direct appeal in reappraisement cases was expressly prohibited by the statute, the question of the legality of the reappraisement decisions of the Board of General Appraisers was raised by protest, and it was undoubtedly because of the cumbrousness of this method that Congress, in section 501 of the Tariff Act of 1922, so far removed the restrictions as to permit the appellate jurisdiction of the Court of Customs Appeals to be exercised in reappraisement cases on questions of law. In view of the fact that section 489 does not make the decisions of the Board of General Appraisers in remission cases final and conclusive, we must conclude that Congress left the way to review open. Why should we assume that Congress intended that the review should be by the more cumbrous method of protest, instead of by direct appeal, when Congress has indicated the directly contrary intent in reappraisement cases? It is difficult indeed to understand why the United States should wish to shut the door upon the method of direct appeal, the advantages of which it has already so frequently made use of in these remission

cases, when the result will be merely to substitute a more cumbrous and inconvenient method of appeal by way of protest.

*It is ascertainable from the decisions of this Court, that the Board of General Appraisers is not above the law even in cases where the law does not specifically grant a right of appeal.*

In *Waite, et al., as General Appraisers, etc. v. Macy, et al.*, 246 U. S. 606, this Court held (p. 610) that the Board of General Appraisers must keep within the statute. That case arose under the Tea Act, March 2, 1897, c. 358, 29 Stat. 604, and as the case had nothing whatever to do with the Customs laws and did not involve a money claim, there was no remedy by appeal and it was necessary to resort to the remedy by injunction.

A similar case is *Campbell v. U. S.*, 107 U. S. 407. In that case the Secretary of the Treasury had refused the payment of drawback to which Campbell was entitled under section IV, Act of Cong., Aug. 5, 1861, c. 45. No right of appeal was given by the statute. Campbell sued in the Court of Claims for an allowance of the drawback. This Court held (p. 410) that the Court of Claims had jurisdiction of such a claim because it was founded on a law of Congress.

In the present case the importer contends that the Court of Customs Appeals has jurisdiction because the case is based on the laws and regulations governing the collection of the Customs revenues and because it involves a question as to the jurisdiction of the Board of General Appraisers.

## IV.

If the petitions for remission of additional duties (which, under the Board's rule, were filed before the liquidation of the entries) are premature, then all the proceedings thus far have been a nullity, and the importer will have the opportunity, upon the liquidation of the entries, of filing petitions which are valid and timely under the amended rule of the Board.

As pointed out above, the petitions for remission in this case were filed within sixty days from the date of final appraisement without waiting for the liquidation of the entries. It has many times been held that there is no limit of the time for the original liquidation of an entry. *United States v. De Rivera*, 73 Fed. 679. Therefore, the result of the original rule of the Board of General Appraisers (T. D. 39370) was to require the filing of petitions for remission before liquidation. By its later rule in T. D. 40464, the Board of General Appraisers extended the time for filing the petition to sixty days after the liquidation. It is believed that the amended rule conforms more directly to the requirements of the statute and the intent of Congress.

*Under the statute there can be no petition for remission of additional duties before liquidation, for until liquidation it is not determined that there will be any additional duties.*

The wording of section 489 shows that petitions should be filed after liquidation. It will be noted that the first part of section 489 provides that in all cases where the statutory elements exist, the additional duties "shall be

levied, collected and paid." There is no exception to this rule. The matter of petition comes later. Of course the levying of the additional duties is the liquidation and, therefore, in view of the language of the statute, the petition must be filed after liquidation. It is manifest that, in spite of its rule, the Board of General Appraisers has no jurisdiction of a petition under section 489 until after the additional duties have been "levied, collected and paid." The subject-matter requisite for jurisdiction is lacking. There are no additional duties to be remitted and there never will be any unless the Collector determines them on liquidation.

If we look at the first part of section 489 we find that, even though the appraised value may be different from the entered value, there are no additional duties if (1) the merchandise is subject to specific duty, (2) the entered value is not exceeded by the final appraised value, (3) the total amount of duty is not increased by the final appraisement. The point of the whole matter is that the reappraisement decision does not determine these questions, but the determination of each is a matter solely for the Collector, and his determination is made on the liquidation of the entry.

The appraisement does not determine the dutiable classification of the merchandise. The Collector is the classifying officer and his decision is the liquidation of the entry. Article 174, Customs Regulations, 1923, paragraphs (a), (c). Article 1235, Customs Regulations, 1923, states that the Appraiser shall "describe the merchandise in order that the Collector may determine the dutiable classification thereof."

The appraisement does not determine that the appraised value exceeds the entered value. This must be

determined by the Collector on liquidation. Of course this is a very easy matter in a case like the one now under consideration where the appraisement and the entry are made in the same currency. If the appraisement and the entry are made in different currencies the determination is more difficult and must be made by the Collector on liquidation. The conversion of the currency is the duty of the Collector and is not an appraising function. *Masson v. United States*, 1 Ct. Cust. Appls., 149. The Treasury Department announced the rule for customs officers in T. D. 37365, 33 Treas. Dec. 220, 221, paragraph (6).

Whether the total amount of duty is increased by the final appraisement can of course be determined only by the Collector on liquidation.

*If a petition for remission of additional duties is filed after liquidation under the amended rule of the Board of General Appraisers, then there is an appeal to the Court of Customs Appeals from the decision of the Board on such petition because, in addition to the reasons given above, the case is a case "as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification" within the meaning of section 195 of the Judicial Code.*

**The judgment of the Court of Customs Appeals should be affirmed, or the petitions for remission should be held to be premature.**

Respectfully submitted,

ALLAN R. BROWN,  
Attorney for Respondent.

